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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GRAHAM McBEATH,

Plaintiff and Appellant,

v.

EVAN BUSTOS,

Defendant and Respondent.

B246122

(Super. Ct. No. MC021635)

EVAN BUSTOS,

Defendant and Appellant,

v.

GRAHAM McBEATH,

Plaintiff and Respondent.

B247324

APPEALS from a judgment of the Superior Court of Los Angeles County,  
Randolph Rogers, Judge. Affirmed in part, reversed in part and remanded.

Law Offices of L. Rob Werner, Jeffrey Morris, and Troy Werner, for Plaintiff,  
Appellant and Respondent.

Hanger, Steinberg, Shapiro & Ash, Paul Ash, and Josephine N. Baurac, for  
Defendant, Respondent and Appellant.

The same facts give rise to these two consolidated appeals. Graham McBeath sued Evan Bustos for motor vehicle negligence, negligence per se, negligent entrustment, and driving while intoxicated with actual malice. Bustos previously had been convicted of a felony count of driving under the influence. The jury returned a verdict finding Bustos negligent, and apportioning a majority of fault to McBeath. It awarded special damages of \$36,513.50 to McBeath, but no general damages. The trial court denied McBeath's motion for a new trial, finding the verdict adequate despite awarding no general damages. It also awarded \$65,970 of attorney fees to McBeath.

In case no. B246122, McBeath challenges the court's denial of his motion for a new trial. He argues the verdict is inadequate as a matter of law because the jury failed to award general damages for his pain and suffering. Bustos argues the verdict should be upheld, because the jury reasonably could have concluded that McBeath suffered no general damages. In case No. B247324, Bustos appeals the court's award of attorney fees to McBeath. Among other claims, he contends McBeath's pleadings were insufficient, and there was no statutory basis to award fees. McBeath argues the award was proper pursuant to Code of Civil Procedure section 1021.4.<sup>1</sup> We reverse and remand for a limited trial on the amount of general damages, but affirm in all other respects.

### **FACTUAL AND PROCEDURAL SUMMARY**

McBeath and Bustos arranged to meet at Bustos's home on the night of June 20, 2009. They planned to listen to music, relax, and drink alcoholic beverages. Sometime around 6:00 p.m., McBeath and his friend Patrick Harrison arrived together at Bustos's house in Harrison's truck. Harrison departed to attend a party, but left his keys and his truck with McBeath and Bustos. Over the next few hours, McBeath and Bustos drank beer and consumed liquor. At trial, McBeath admitted to consuming two beers and at least as many shots. Bustos said he consumed four to five shots. Sometime around 10:30

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<sup>1</sup> All further references are to the Code of Civil Procedure, unless otherwise specified.

p.m., Harrison called McBeath asking for a ride. McBeath and Bustos decided to drive Harrison's truck to pick him up.

McBeath started to drive with Bustos in the passenger seat. At the time, McBeath's driver's license had been suspended for a prior offense of driving under the influence (DUI). When the truck began to stall, Bustos took over driving. McBeath switched to the passenger's seat. As Bustos approached an intersection, he thought it was a four-way stop. He slowed to a speed of 20 miles per hour, but did not come to a complete stop. He did not see any headlights approaching until just before a vehicle collided with the right side of the truck.<sup>2</sup>

Bustos was thrown from the truck. After he was transported to a hospital, a blood test was administered and Bustos subsequently was arrested. Under a plea agreement with the prosecutor, Bustos pled guilty to one felony count of driving under the influence. He was sentenced to 16 months in state prison and ordered to pay fines and restitution to victims of the collision.

The impact of the collision instantly rendered McBeath unconscious. When he awoke, the truck was lying on its side. He pulled himself out. Less than five minutes later, he was treated by paramedics who already were on the scene. He felt as if his arm and ribs were broken. In the ambulance on the way to the hospital, McBeath said he experienced pain over his neck and the entire right side of his body.

McBeath remained at Antelope Valley Hospital for two and a half days. During that time, he continued to suffer pain over the right side of his body and in his neck. Painkillers were prescribed. Physicians told him that he had fractured his "C-1 vertebrae," and that he was lucky to be alive.<sup>3</sup> One physician told McBeath to seek a

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<sup>2</sup> The driver of the vehicle that collided with the truck is not a party to the present appeal.

<sup>3</sup> At trial, McBeath described his injury as a fracture of his "C-1 vertebrae." However, the expert medical witness described it as a "non displaced fracture" and

different job, since his occupation as a contractor would be made difficult by the likely residual neck pain, inability to stand or bend over for long periods of time, and difficulty raising his hands above his head. For three months after leaving the hospital, McBeath wore a “minerva jacket,” a hard, plastic, vest-like device that restricts neck movement.

After his hospital stay, McBeath attended follow-up appointments at an imaging center and Kaiser Permanente. One month after the accident, he was prescribed a painkiller, hydrocodone, to be taken three times per day. He continued taking both medications until about three months after the accident. On a physician’s recommendation, McBeath also saw a chiropractor. At trial, McBeath said he could not exercise, work as a general contractor, or play with his nephew. He continues to experience pain at the base of his skull, struggles to stand for long periods of time, and has difficulty raising his hands over his head.

On May 26, 2010, McBeath sued Bustos and Linda Harrison, mother of Patrick Harrison and owner of the truck.<sup>4</sup> He pled four causes of action: (1) motor vehicle negligence; (2) negligence per se; (3) negligent entrustment; and (4) driving while intoxicated with actual malice. McBeath sought general damages, special damages, punitive damages, costs, and further relief as deemed proper. Bustos filed a timely answer claiming multiple affirmative defenses, including comparative negligence and a failure to mitigate damages.

The case was tried to a jury. Dr. Robert Wilson, a witness for the plaintiff, provided expert medical testimony. Dr. Wilson is an orthopedic surgeon with experience in trauma medicine and C-1 fractures. He reviewed McBeath’s medical records, but

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confirmed that McBeath was diagnosed with a “C-1 condylar fracture.” Hospital records describe it as a “C-1 condylar fracture.”

<sup>4</sup> Linda Harrison is not a party to this appeal. In September 2012, McBeath released all claims against Harrison as a result of the accident in exchange for a \$15,000 payment. The signed agreement expressly did not release Bustos. However, the \$15,000 payment was intended as a “set-off . . . [of] damages for which Linda Harrison and Evan Bustos are jointly and severally liable and . . . accordingly, Evan Bustos will receive a \$15,000 credit against any judgment entered against Evan Bustos.”

conducted no physical examination because it was not necessary in order to render his opinion. Dr. Wilson stated that McBeath suffered pulmonary contusions, an injured ligament, and a fracture of a bone at the bottom of the head, the C-1 condyle. By the time of trial (October 2012), the fracture had healed completely, and Dr. Wilson described McBeath's recovery as "good." During cross-examination, Dr. Wilson stated that many patients with C-1 condyle fractures do not seek treatment or suffer further problems, but there remains a risk of paralysis and death. He confirmed that the force of the accident in this case was sufficient to cause a fatality. He also corroborated McBeath's claims of pain as a result of the collision.

On the issue of damages, the jury was instructed in terms of CACI Nos. 3901 to 3903A, which specified McBeath's claims for economic damages from medical expenses and noneconomic damages for pain and suffering.<sup>5</sup> In its verdict, the jury found Bustos negligent, but did not find the malice claim to be true. It awarded McBeath \$36,513.50 in economic damages but no noneconomic damages. The jury also found that McBeath was negligent, and that his negligence was a substantial factor in causing his harm. It assigned 51 percent fault to McBeath and 49 percent fault to Bustos. As a result, the court ordered Bustos to pay McBeath \$17,891.62 (49 percent of \$36,513.50).

Following the verdict, McBeath moved for a new trial pursuant to section 657, subdivision (5) on the ground of inadequate damages. Bustos opposed the motion, claiming that McBeath failed to establish that pain and suffering accompanied his injuries. The trial court denied McBeath's motion, and filed judgment on November 29, 2012. It ruled that a reasonable jury could have concluded McBeath suffered no substantial pain because he was immediately rendered unconscious and required no invasive surgery. McBeath filed a timely notice of appeal.

Meanwhile, on November 15, 2012, McBeath filed a motion for attorney fees pursuant to section 1021.4, which permits the trial court to award a plaintiff attorney fees

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<sup>5</sup> Appellant's appendix contains only CACI No. 3900. However, the reporters' transcript indicates that CACI Nos. 3901-3903A were provided to the jury instead. We assume that the jury was instructed pursuant to CACI Nos. 3901-3903A.

in actions based upon the defendant's felony conviction. In his memorandum of costs, McBeath claimed the court should award him \$3,113.63 in costs and \$79,520 in attorney fees because Bustos's felony DUI, for which he was convicted, was the basis for McBeath's injuries. Attached to the motion was a declaration from McBeath's attorney that authenticated an enclosed spreadsheet itemizing the legal work completed for the negligence action against Bustos. Bustos filed a memorandum of costs, a motion to strike or tax costs, and an opposition to McBeath's motion. Among other points, he argued that McBeath's injuries were not based on the commission of a felony offense and that his pleadings were insufficient. The court granted McBeath's motion in its entirety, and awarded him \$65,970 in attorney fees. The court reduced McBeath's claimed amount after subtracting paralegal costs and time spent on the other defendant. Bustos filed a timely notice of appeal.

We consolidated these appeals, and subsequently requested supplemental briefing from the parties on whether Bustos's attorney fee appeal was ripe since McBeath's damages appeal had not yet been decided. We review both appeals below. (See *Roden v. AmerisourceBergen Corp.* (2005) 130 Cal.App.4th 211, 216 [“postjudgment orders “making a final determination of rights or obligations of parties” are appealable even though they do not necessarily add to or subtract from the judgment”].)

## **DISCUSSION**

### **I**

McBeath argues the jury's failure to award general damages for pain and suffering while simultaneously compensating him for medical damages indicates the verdict is inadequate as a matter of law. He also claims the jury verdict was the result of passion and prejudice against him, and asks that we order a new trial to determine the amount of general damages.

“Code of Civil Procedure section 657 states: “A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the

evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.” A trial court has broad discretion in ruling on a new trial motion, and the court’s exercise of discretion is accorded great deference on appeal. [Citation.] An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court’s decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] Accordingly, we can reverse the denial of a new trial motion based on insufficiency of the evidence or [inadequate or] excessive damages only if there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted.’ [Citation.]” (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1415-16 (*Rayii*).)

Also, “[w]hen a verdict has been returned for the exact amount of special damages in a case where substantial general damages were obviously incurred, and where a strong case of negligence has been made, a denial of a new trial by the trial court *must* be held an abuse of discretion and a judgment on a verdict in an insufficient amount may not be affirmed.’ [Citation.]” (*Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 587, *italics added* (*Haskins*).) In other words, “‘a judgment for no more than the actual medical expenses occasioned by the tort would be inadequate.’” (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 937 (*Dodson*) quoting *Miller v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555, 558 (*Miller*).) “It cannot be said, however, that because a verdict is rendered for the amount of medical expenses or for a less amount the verdict is inadequate as a matter of law. Every case depends upon the facts involved.” (*Miller*, at p. 558.) Courts may uphold verdicts awarding special but not general damages where contradictory evidence raises doubts about whether such damages were actually incurred, or there is “insufficient or conflicting evidence on the elements of damage.” (*Haskins*, at p. 584; see *Dodson*, at p. 936.)

Here, the jury’s verdict of special damages, with no general damages, cannot be justified by the evidence. In awarding special damages of \$36,513.50 to McBeath, the

jury compensated him for his requested amount of medical costs resulting from the accident.<sup>6</sup> His medical complications were uncontested and supported by expert testimony. Dr. Wilson verified that the force of the accident was sufficient to cause a fatality. He also corroborated McBeath's testimony about his C-1 condyle fracture, extended pain, and ongoing medical challenges due to the accident. By finding Bustos to be negligent, and failing to award McBeath any general damages, the jury issued a verdict similar to that in *Haskins*, where the court ordered a new trial to determine the issue of general damages after the jury awarded "in effect . . . nothing for the pain, suffering and inconvenience which inevitably accompany the type of injuries . . . involved." (*Haskins, supra*, 252 Cal.App.2d at p. 587.) The evidence here was neither insufficient nor conflicting. It showed that McBeath suffered from the injuries of the accident. As a result, the court erred in denying McBeath's motion for a new trial.

Also, the jury was not entitled to disregard the court's instructions on noneconomic damages. (See *Vollaro v. Lispi* (Feb. 26, 2014, A050366) \_\_ Cal.App.4th \_\_ [2014 Cal.App. LEXIS 181, \*25] quoting *Sherwood v. Rossini* (1968) 264 Cal.App.2d 926, 930 ["[A] verdict which is patently contrary to the court's instructions on damages does not cover or comprehend the issues submitted and is therefore insufficient." [Citation.]"]). It appears that the court provided CACI Nos. 3901-3903A, which instructed jurors that they "must decide how much money will reasonably compensate . . . McBeath for the harm. This compensation is called 'damages.' [¶] The amount of damages must include an award for each item of harm that was caused by . . . Bustos'[s] wrongful conduct . . . ." The instructions listed McBeath's request for \$36,513.60 in economic medical damages and \$250,000 in noneconomic damages for

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<sup>6</sup> We find no definitive accounting of appellant's medical costs in the record. However, there is no challenge on appeal to the jury's award of \$36,513.50 in special damages. In addition, the jury instructions list McBeath's claimed economic damages as \$36,513.60, and his motion for attorney fees includes the same request. The 10 cent difference between McBeath's requested amount and the jury's final award of \$36,513.50 is insignificant.



pain and suffering.<sup>7</sup> During closing arguments, McBeath's counsel expressly "request[ed] that [the jury] reimburse my client for the pain and suffering that [he] incurred in this horrific accident." Even Bustos's counsel conceded that "[t]here is some pain and suffering . . . [t]here is some pain" involved in McBeath's recovery from the accident. When the evidence at trial was uncontested that McBeath suffered pain as a result of the accident, and jurors were on notice as to the instructions on general damages, they were required to apply the law as given by the trial court. Thus, in failing to award any amount for general damages, the jury improperly disregarded its instructions to compensate McBeath for his pain and suffering caused by Bustos. (See *Boam v. Trident Financial Corp.* (1992) 6 Cal.App.4th 738, 743 ["A jury is bound to follow proper instructions, and a verdict contrary thereto is against the law."].)

Bustos argues we should not disturb the jury's verdict because of an alleged evidentiary conflict at trial regarding the nature and extent of McBeath's suffering. He emphasizes that Dr. Wilson described McBeath's recovery as "good," and testified that many patients with C-1 condyle fractures do not seek treatment. As a result, Bustos contends the jury could have reasonably concluded that McBeath suffered no pain and suffering. He cites the trial court's statement of decision on the motion for a new trial, which described how McBeath was "knocked unconscious in the accident, . . . was able to pull himself out of the wreck . . . [,] required no invasive surgery and . . . was required to wear a chest and neck brace in order to prevent further injury to his back. While such a restraint would be uncomfortable, a jury could certainly conclude that [McBeath's] discomfort would not be sufficiently serious to warrant an award for pain and suffering."

In *Miller, supra*, 212 Cal.App.2d 555, the appellate court affirmed a jury award of plaintiff's exact amount of requested medical damages with no award of noneconomic damages. It found the evidence of plaintiff's injuries was contested where defendant had

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<sup>7</sup> Appellant's appendix includes only CACI No. 3900, from which we draw this amount of requested damages. Because CACI No. 3900 is substantially similar to CACI No. 3901, we infer that the instruction as given contained the same requested amount listed in CACI No. 3900, as provided in the record, which we include here.

demonstrated that plaintiff falsified her injuries and physicians had indicated she was not harmed by defendant's conduct. In short, "[t]he evidence would . . . amply support a finding that plaintiff received no injury whatever." (*Id.* at p. 560.) Similarly, the court in *Rayii*, dismissed plaintiff's challenge to the inadequacy of noneconomic damages. "Conclud[ing] that the evidence was in substantial conflict," the court highlighted how defendants showed that plaintiff's injuries were preexisting or caused by subsequent other actions, and had healed by the time of trial. (*Rayii, supra*, 218 Cal App.4th at p. 1416.)

Unlike those two cases, the undisputed evidence here shows that McBeath suffered at least some pain due to defendant's conduct. He testified to being prescribed painkillers and spending more than two days in the hospital. There was no evidence to contradict McBeath's testimony regarding the pain he suffered and the impact of the resulting injuries on his life. Bustos's counsel presented no competing expert witnesses, or evidence that McBeath suffered no general damages. Accordingly, unlike the cases on which Bustos relies, the evidence at trial did not raise doubts about whether McBeath incurred some general damages. As a result, the court abused its discretion in denying McBeath's motion for a new trial.

## II

Bustos raises five challenges to the trial court's award of attorney fees to McBeath: there was no statutory basis for the award, Bustos's due process rights were violated, the award to a majority tortfeasor violates public policy, the evidence was insufficient for the trial court to determine an award amount, and fees should not be awarded if incurred during McBeath's action against Harrison.

"The determination of the statutory basis for an attorney fees award presents a legal issue for us to determine anew on appeal, regardless of the trial court ruling." (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1132-1133 (*Akins*).) However, "[t]he amount of an attorney fee to be awarded is a matter within the sound discretion of the trial court." (*Id.* at p. 1134.) "[A]n abuse of discretion transpires if "the

trial court exceeded the bounds of reason” in making its award of attorney fees.” (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 557 (*Premier Medical*).)

A. *Section 1021.4 and Due Process*

Bustos argues that McBeath did not bring his complaint based on Bustos’s felony DUI conviction, and therefore the trial court erred in awarding attorney fees under section 1021.4. He also claims that McBeath did not include a specific prayer for attorney fees in his original complaint. As a result, he contends the court deprived him of his due process rights under the 14th Amendment of the United States Constitution.

“In an action for damages against a defendant based upon that defendant’s commission of a felony offense for which that defendant has been convicted, the court may, upon motion, award reasonable attorney’s fees to a prevailing plaintiff against the defendant who has been convicted of the felony.” (§ 1021.4.) The Code of Civil Procedure provides, in relevant part, that a complaint must contain “[a] demand for judgment for the relief to which the pleader claims to be entitled.” (§ 425.10, subd. (a)(2).) However, in all actions other than default judgments, “the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. The court may impose liability, regardless of whether the theory upon which liability is sought to be imposed involves legal or equitable principles.” (§ 580, subd. (a).) Courts have interpreted this statute to require adequate pleading of damages and attorney fees. (E.g., *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 495 (*Becker*).) These “restrictions on the amounts of damages awarded *in a default judgment* . . . [exist] to ensure that a defendant is given adequate notice of the amount of the judgment that may be entered against the defendant, as required by due process. [Citation.]” (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 61, italics added.) In all other cases, courts may grant relief pursuant to section 580, “[r]egardless of how a pleading is labeled or a prayer is framed . . . .” (*Lee v. Blue Shield of California* (2007) 154 Cal.App.4th 1369, 1378.)

The trial court awarded attorney fees to McBeath under section 1021.4 for three reasons: “(1) Defendant drove through a stop sign while driving under the influence of alcohol; (2) Plaintiff, the passenger in Defendant’s vehicle, was injured in the ensuing accident; and (3) Defendant was charged and convicted of driving while under the influence of alcohol.” Bustos’s DUI conviction was undisputed at trial, and confirmed when he testified. McBeath’s original complaint described how Bustos “consumed alcohol to the point of intoxication and thereafter drove the vehicle with Plaintiff McBeath as a passenger . . . [¶] . . . [¶] [and] [a]s a direct, legal, and proximate result of the acts of defendants, Plaintiff was hurt and injured . . . .” From all indications, McBeath brought his suit, at least in part, based on Bustos’s felony DUI conviction. Under these circumstances, awarding fees under section 1021.4 was “consistent with the case made by the complaint and embraced within the issue.” (§ 580, subd. (a).) As a result, the court did not err in awarding McBeath attorney fees pursuant to section 1021.4.

Bustos argues McBeath based his lawsuit on a misdemeanor traffic violation, and not his felony DUI conviction. He cites to McBeath’s complaint, which states that “Bustos proceeded through an intersection without making the requisite stop . . . in violation of California Vehicle Code 22450(a).” Because such a violation is only a misdemeanor, Bustos argues McBeath’s lawsuit was not based on his felony conviction. However, McBeath’s complaint also described Bustos’s act of driving while intoxicated, which was a central issue at trial, as discussed above. As a result, the additional pleading of a misdemeanor violation does not take McBeath’s action outside of the scope of section 1021.4. (See *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 538 [“In a contested action a defective or even missing prayer is not fatal to recovery . . . .”].)

With regards to Bustos’s due process claim, there was no default judgment, so the protections of section 580 do not apply. Instead, the matter proceeded to trial, during which Bustos opposed McBeath’s case. As we have described, the fees awarded were within the scope of section 580. Thus, pursuant to that statute, McBeath was under no

obligation to specifically plead attorney fees in his complaint, and Bustos suffered no deprivation of due process.

Bustos relies on two cases to support his argument that McBeath cannot recover attorney fees unless he expressly prayed for them in his complaint. Neither applies since both arise out of default judgments. In *Becker*, the court reversed an award of attorney fees where the plaintiff did not plead them in his opening complaint. (See *Becker, supra*, 27 Cal.3d at p. 495.) However, limiting its holding to cases of default judgments, the court wrote, “The primary purpose of this section [580] is to insure that defendants in cases which involve a default judgment have adequate notice of the judgments that may be taken against them.” (*Id.* at p. 493.) In *Wiley v. Rhodes* (1990) 223 Cal.App.3d 1470, the court reached a similar outcome, finding improper an award of attorney fees since it was not pled in the complaint, and defendants were not provided notice. Citing *Becker, supra*, 27 Cal.3d 489, the court stated, “Due process requires a defendant in a case involving a default judgment be given adequate notice of the judgment that may be entered.” (*Id.* at p. 1472.) The present case did not involve a default judgment. Instead, Bustos filed an answer to McBeath’s complaint, asserting multiple affirmative defenses. At the trial in October 2012, Bustos opposed the complaint. Bustos’s reliance on these two cases is misplaced.

#### B. *Public Policy*

Bustos argues the trial court abused its discretion and violated public policy when it awarded attorney fees to McBeath, who was more at fault than he. Bustos also contends that because the jury found Bustos acted without malice, attorney fees are not permitted.

A court may consider a victim’s fault when exercising its discretion to award attorney fees under section 1021.4. (*Sommers v. Erb* (1992) 2 Cal.App.4th 1644, 1650 (*Sommers*) [affirming attorney fee award under section 1021.4 to plaintiff in case against felony drunk driver even though plaintiff was also intoxicated at time of accident].) However, a victim’s fault or criminal behavior “is not a bar to recovery of attorney’s fees

under section 1021.4.” (*Ibid.*) Instead, such factors are “for the trial court to consider in its discretion to award such fees.” (*Ibid.*) Also, “[n]othing in the language of section 1021.4 suggests that attorney fees should be offered only in felonies that involve malice.” (*Ibid.*) Accordingly, the court here did not err in awarding McBeath attorney fees despite his 51 percent comparative fault and the jury’s finding that Bustos acted without malice.

Bustos argues *Sommers* does not apply because it did not involve an adjudication of plaintiff’s fault. In that case, the plaintiff motorcyclist was injured when he collided with a truck. (*Sommers, supra*, 2 Cal.App.4th at p. 1646.) The truck driver was convicted of a felony count of causing bodily injury while driving under the influence. (*Ibid.*) The court found that *Sommers* also was driving under the influence at the time, but there was no evidence of a related charge or conviction. (*Ibid.*) The parties filed a stipulated judgment favoring *Sommers*, and “[t]he issue of attorney fees was expressly left open for resolution by the trial court.” (*Id.* at p. 1647.) The appellate court upheld the award of attorney fees to *Sommers*. (*Id.* at p. 1652.) Bustos contends this case is distinguishable because there was no jury finding of comparative fault, and an agreement expressly provided for attorney fees. We disagree. Like the parties in *Sommers*, both McBeath and Bustos were intoxicated. Bustos was convicted of a felony, as was the defendant in *Sommers*. Although there was no express finding of comparative negligence in *Sommers*, the appellate court acknowledged plaintiff’s intoxication during the accident, and stated that his “fault . . . or even his criminal behavior . . . is not a bar to recovery of attorney’s fees under section 1021.4.” (*Id.* at p. 1650.) In any event, the court also found that the trial court has discretion to consider plaintiff’s fault when awarding attorney fees. (*Ibid.*) As a result, the reasoning in *Sommers* supports our finding here.

Bustos also relies on *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308. In that case, the court affirmed the trial court’s denial of a motion for attorney fees pursuant to section 1021.4. (*Id.* at p. 1341.) The plaintiffs sued a motorist for injuries suffered in an auto accident. The motorist was convicted of a felony count of fleeing the scene of an injury accident, but was found not guilty on a separate count for driving under the

influence. (*Id.* at p. 1319.) The court held that the plaintiff's case, based on the motorist's felony conviction for fleeing the scene, did not support the award of attorney fees under section 1021.4. (*Id.* at pp. 1340-1341.) The court distinguished the case involving a felony conviction for fleeing the scene, and a case of a felony conviction for causing or being involved in the accident itself. The flight conviction in that case was not a proper basis for awarding attorney fees under section 1021.4. (*Id.* at p. 1341.) In contrast to that case, here Bustos was convicted of a felony count of DUI, and not fleeing the scene of the accident.

Bustos also argues that the court abused its discretion in awarding \$65,970 in attorney fees when McBeath's net judgment was only \$2,891.62.<sup>8</sup> Assuming but not deciding that Bustos's math is correct, we do not disturb a trial court's determination of attorney fees absent an abuse of discretion. (*Premier Medical, supra*, 163 Cal.App.4th at p. 557; *Akins, supra*, 79 Cal.App.4th at p. 1134.) Here, there is evidence that the trial court exercised its discretion in reducing the attorney fee award from \$79,520 to \$65,970 based on work done by paralegals and on other matters. We decline to hold that this award amounts to an abuse of the court's discretion. (See *Olson v. Cohen* (2003) 106 Cal.App.4th 1209, 1217 ["We will reverse [an award of attorney fees] only if the amount awarded is so large or small that we are convinced it is clearly wrong"]; *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1398 ["while the degree of the plaintiff's success in obtaining the objectives of the litigation is a factor that the trial court may consider in determining an award of reasonable attorney fees under a fee statute [citations], . . . we determine that there is no requirement that the trial court make an award of attorney fees in an amount that is commensurate with or in proportion to the degree of success in the [statutory] litigation".])

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<sup>8</sup> In order to magnify this disparity, Bustos subtracts \$15,000 from the amount of damages McBeath was awarded, after taking into account his 51 percent comparative fault. Bustos contends that McBeath's settlement agreement with Harrison entitles him to this \$15,000 reduction.

C. *Evidence of Fees*

Bustos claims that the spreadsheet accounting of McBeath's attorney charges lacked sufficient particularity for the trial court to award him fees.

“[T]he moving party . . . “bear[s] the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.” [Citation.] To that end, the court may require [a] defendant[ ] to produce records sufficient to provide “a proper basis for determining how much time was spent on particular claims.” [Citation.] The court also may properly reduce compensation on account of any failure to maintain appropriate time records. [Citation.]’ [Citation.] The evidence should allow the court to consider whether the case was overstaffed, how much time the attorneys spent on particular claims, and whether the hours were reasonably expended. [Citation.]” (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320.)

The trial court reviewed a spreadsheet of McBeath's attorney charges that listed the task, employee hours, rate, and total charges. On questions of fact such as these, we defer to the trial court's determination. (*Akins, supra*, 79 Cal.App.4th at p. 1134.) We find no basis to conclude that the court abused its discretion in determining an attorney fee award based on the information in McBeath's spreadsheet.

D. *Fees Outside of Present Case*

Bustos argues that the attorney fee award included costs incurred in McBeath's case against Harrison, who was not convicted of a felony. He claims that the portion of fees accumulated during litigation against Harrison cannot be awarded under section 1021.4.

We also defer to the trial court's determination that the awarded fees were incurred in McBeath's case against Bustos. (See *Akins, supra*, 79 Cal.App.4th at p. 1134.) Because the court's statement of decision indicates that it reduced the attorney fee award based on work done on claims against the other defendant and by paralegals, we presume that it excluded fees for attorney work completed in McBeath's case against Harrison.



### **DISPOSITION**

The judgment on McBeath's motion for a new trial is reversed. The matter is remanded for a limited new trial on the issue and amount of general damages, leaving intact the earlier jury verdict regarding fault and specific damages. The judgment on McBeath's motion for attorney fees is affirmed. McBeath is to recover his costs on appeal.

### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EPSTEIN, P. J.

We concur:

MANELLA, J.

EDMON, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.